THE CASE OF SPRECKELS SUGAR REFINING CO. *v.* MCCLAIN. — In an article by Mr. Francis W. Bird in the last number of this Review, the case of *Spreckels Sugar Refining Co.* v. *McClain*, in which the excise tax on the business of refining sugar was sustained, was stated with reference to its bearing on the Corporation Tax Cases.[1] At the request of subscribers, the Review publishes the following statement concerning the decision of the Spreckels case.

An examination of the decisions with reference to the question of income from wharves and investments shows that the Circuit Court held both income from wharves and income from investments taxable.[2] In the Circuit Court of Appeals, Dallas and Acheson, J. J., confirmed this ruling. Gray, J., agreed as to the income from wharves but dissented as to the income from investments.[3] In the Supreme Court this dissent was confirmed and the decision of the Circuit Court of Appeals was reversed, the final decision being that as the wharves were part of the business plant the receipts from wharves were receipts from the business and so taxable; but that income from investments and bank deposits not part of the business of sugar refining, was not within the statute taxing that business. These questions were treated as questions of statutory construction.[4]

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE. — Is a woman eligible for public office? In many states this question is answered by express provisions in the constitution, some restricting the privilege to males [1] and a few forbidding sex to be a ground for discrimination as to certain offices.[2] And unless the constitution is interpreted as imposing a restriction,[3] the legislature has power to make women eligible.[4] But the cases which are not cared for by such provisions are in hopeless conflict. Up to very recent times, woman's desire to hold office seems to have been slight. A few interesting instances of female officials can be found in the history of mediæval England,[5] but the disputes which came into court usually involved only some such point as the right to a hereditary office;[6] and so the question of the eligibility of women to elective positions was not thoroughly considered. That women are not eligible for judicial offices is law more from absence of any precedent than from actual decisions;[7] and practically nowhere has a woman's right to

[1] 24 HARV. L. REV. 37.
[2] 109 Fed. 76, 79.
[3] 113 Fed. 244, 247.
[4] 192 U. S. 397, 413–417.

[1] See Oh. Const. (1851) Art. V, sec. 1, Art. XV, sec. 4; Ore. Const. Art. II, sec. 2; Art. VI, sec. 8.

[2] See Minn. Const. Art. 7, sec. 8.

[3] See State *v.* Adams, 58 Oh. St. 612; Opinion of the Justices, 165 Mass. 599.

[4] Application of Miss Goodell, 48 Wis. 693; Opinions of the Justices, 62 Me. 596.

[5] For a collection of these, see Robinson's Case, 131 Mass. 376, and 38 L. R. A. 208, note.

[6] See, for instance, *Ex parte* Burrell, 2 Bro. P. C. 146.

[7] See State *v.* Davidson, 92 Tenn. 531; Robinson's Case, *supra; In re* Bradwell, 55 Ill. 535. It has been decided that a woman cannot be a justice of the peace, Opinion of the Justices, 107 Mass. 604; or a prosecuting attorney, Atty.-Gen. *v.* Abbott, 121 Mich. 540; but she may be an arbitrator, Evans *v.* Ives, 15 Phila. 635; or a commissioner to take evidence, The Norway, Fed. Cas. No. 10,358. Statutes now almost

membership in a legislative body been upheld.[8] The question of administrative positions, however, has been more frequently litigated, and is more complex.

A distinction should be made between true public offices and positions of a merely ministerial nature: women are eligible for the latter,[9] and hold thousands in this country. The law seems, moreover, more liberal towards women's being in appointive than in elective offices,[10] and in offices exercisable through a deputy than in those demanding personal attention.[11] While the courts have sometimes said that delicacy or a woman's natural unfitness for executive duties is the reason for barring her,[12] these arguments never appear to have been considered with much seriousness. It has also been argued that the change in the social and economic position of woman should change her political status.[13] But the question is not one of public policy, and the decisions do not seem to have been influenced by the judges' personal opinions on the desirability of administration by women.[14] The sole issue should be whether the sovereign has given women any such political power.[15] In spite of occasional tenure of obscure offices by women in England, the practically uninterrupted usage to the contrary, acquiesced in for centuries, would seem to settle the common law.[16] And although the exclusive use of masculine pronouns in the constitutions in this country has never been regarded as excluding women,[17] there has been little tendency to construe general provisions in their favor. A few judges have thought that where some clauses make sex a qualification, but the eligibility clause does not, the omission is sufficient to open offices to women;[18] but clearer language than this should be required to make so radical a change from the common law, and so several courts have held.[19] Most constitutions restrict suffrage to males,[20] and even where eligibility for office is not expressly confined to electors, it would seem naturally to be predicated on the right to exercise this primary governmental function.[21]

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everywhere allow women to practice law. In the absence of statute, they were generally excluded. Matter of Goodell, 39 Wis. 232; *In re* Bradwell, *supra*. *Contra*, Ricker's Petition, 66 N. H. 207.

[8] See De Souza *v.* Cobden, [1891] 1 Q. B. 687; Beresford-Hope *v.* Lady Sandhurst, 23 Q. B. D. 79.

[9] Anon., 3 Salk. 2 (governess of workhouse); Opinion of the Justices, 136 Mass. 578 (member of health board); Warwick *v.* State, 25 Ohio St. 21 (deputy clerk of court).

[10] *Cf.* Anon., 2 Ld. Raym. 1014, with De Souza *v.* Cobden, *supra;* Harbour-Pitt Shoe Co. *v.* Dixon, 60 S. W. 186 (Ky.), with Atchison *v.* Lucas, 83 Ky. 451.

[11] See Chorlton *v.* Lings, L. R. 4 C. P. 374; Opinion of the Justices, 150 Mass. 586.

[12] See Matter of Goodell, *supra*.

[13] See Atty.-Gen. *v.* Abbott, *supra; In re* Hall, 50 Conn. 131.

[14] See Opinion of the Justices, 73 N. H. 621, 622; State *v.* Stevens, 29 Ore. 464, 474.

[15] See COOLEY, CONSTITUTIONAL LIMITATIONS, 894, note 1.

[16] See Chorlton *v.* Lings, *supra; In re* Bradwell, *supra*. But see *In re* Hall, *supra*. No decision prior to 1870 against woman's eligibility has been found.

[17] See Russell *v.* Guptill, 13 Wash. 360; Atchison *v.* Lucas, *supra*.

[18] Wright *v.* Noell, 16 Kan. 601; Opinions of the Justices, 62 Me. 596. And where, in a revision of a statute, the word "male" was omitted, the change was deemed important. State *v.* Hostetter, 137 Mo. 636.

[19] Beresford-Hope *v.* Lady Sandhurst, *supra;* Atchison *v.* Lucas, *supra*.

[20] See N. Y. Const. Art. II, sec. 1. Mass. Const., Amendments, Art. III.

[21] See State *v.* Van Beek, 87 Ia. 569; State *v.* McMillen, 23 Neb. 385; State *v.* Smith, 14 Wis. 497.

On this ground, several cases have denied women the right to hold office.[22]

It is consequently noteworthy that the Supreme Court of Nebraska, a state which does not give women the ballot,[23] has recently decided that a woman elected to the office of county treasurer may get from the rival male candidate the property pertaining to the office. *State ex rel. Jordan* v. *Quible*, 86 Neb. 417.[24] This is well-nigh the most important elective position which a woman has been sanctioned in holding, and, as a dissenting judge observes,[25] the decision makes it possible for a woman to be even governor.

THE REFERENDUM AS A "REPUBLICAN FORM OF GOVERNMENT." — The referendum has frequently been attacked as a delegation of legislative power and hence contrary to the state constitutions, which vest that power in the legislature.[1] Notwithstanding this argument, a general statute to take effect only if approved by a majority of the voters was upheld in a recent Wisconsin case. *State ex rel. Van Alstine* v. *Frear*, 142 Wis. 320.[2]

In view of the comparative ease with which state constitutions are amended, the relation to them of direct legislation is not of such great practical importance as its validity under the Constitution of the United States. An objection to the referendum, especially when coupled with the initiative, which has frequently been suggested,[3] but is not discussed in the principal case, is that direct legislation violates the clause of the federal Constitution which guarantees to each state a republican form of government.[4] The contention is that a republic is a representative democracy as distinguished from a direct or pure democracy. Hence it becomes important to determine the true meaning of the word.

The Latin *res publica*, at least as late as the sixteenth century, was altogether colorless as to the form of government it designated.[5] The compound adjective is not found in classical or mediæval Latin.[6] The noun "republic" and the adjective "republican" were used by Wilson,[7]

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[22] See Atty.-Gen. *v.* Abbott, *supra;* Atchison *v.* Lucas, *supra.* But see State *v.* Hostetter, *supra;* Wright *v.* Noell, *supra.* It has been said that conferring suffrage on women makes them eligible for office. See State *v.* Cones, 15 Neb. 444. *Cf.* Olive *v.* Ingram, 2 Strange 1114. But in England it has been held that a woman is not eligible even for an office for which she can vote. Beresford-Hope *v.* Lady Sandhurst, *supra.*

[23] But see State *v.* Cones, *supra.*

[24] The decision went on the ground that this is the common law. The constitution formerly restricted office-holding to voters. Neb. Const. (1866) Art. III, sec. 4. And members of the legislature are expressly required to be electors. Neb. Const. (1875) Art. III, sec. 5. But the court did not comment on these points.

[25] See 86 Neb. 417, 420.

[1] For a discussion of this phase of the problem, see 7 HARV. L. REV. 485; 16 *ibid.* 218.

[2] For a discussion of another point in the same case see 24 HARV. L. REV. 50.

[3] See MCCLAIN, CONSTITUTIONAL LAW, 10; 56 CENT. L. J. 247. But see Southwestern Telegraph & Telephone Co. *v.* City of Dallas, 131 S. W. 80 (Tex.).

[4] U. S. CONST. art. 4, § 4.

[5] See CALVIN, INSTITUTIONUM CHRISTIANAE RELIGIONIS, lib. 4, cap. 20.

[6] It does not appear in DU CANGE, GLOSSARIUM.

[7] See Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 457.